

A Aceside (M) Sdn Bhd v YMN Properties Sdn Bhd & Ors

B HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-22NCC-23-07
OF 2017
MOHD IVAN JC
31 JANUARY 2019

C *Contract — Building contract — Claim for payment — Plaintiff claimed for outstanding contract payment from first defendant — Plaintiff sued second and third defendants under guarantee in relation to contract — Whether plaintiff main contractor or subcontractor — Privity of contract — Whether there was contractual relation between first defendant and plaintiff — Whether guarantee effective — Whether burden of proof of plaintiff's case satisfied — Whether plaintiff's claim sufficiently made out and correct*

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E This was an action by the plaintiff against the first defendant for outstanding contract payments and the second and third defendants under a guarantee in relation to the aforementioned contract. The first plaintiff was appointed by the first defendant as contractor to complete the building of terrace houses in a medium low cost housing project from the Johor State Government pursuant to a letter of award dated 3 August 2011 at a contract sum of RM41,150,000. The plaintiff claimed to have undertaken the works and that the works were

F certified to have been duly completed. The defence alluded that the plaintiff had been appointed the subcontractor and that YMB Tebrau Sdn Bhd ('main contractor') was the main contractor for the project. The defence alleged that the works completed by the plaintiff had been certified by the architects whereby the progress claim certificates had been issued by the contractor and

G not the first defendant. It was contended that the first defendant was not the party responsible for making payment as it was merely the developer appointed by the main contractor and therefore there was no contractual relationship between the first defendant and the plaintiff. The guarantee was contended to not be binding as the letter of award was between the main contractor and the

H plaintiff, there was no privity of contract between the plaintiff and the first defendant. The plaintiff had contended that the contract, all minutes of meetings and progress payment certificates had been between the plaintiff and the first defendant. The guarantee was interpreted by the plaintiff as requiring

I the second and third defendants to pay as and when certificate of practical completion had been issued for Phases 1, 2 and 3A individually and not collectively in the event the first defendant failed to pay.

Held, allowing the claim with costs of RM10,000:

- (1) Apart from the letter of award, the other documentary evidence found in Bundle B was a letter issued by the Construction Industry Development Board ('CIDB') which had given the plaintiff under Grade G7 registration, approval to undertake the project. There were also a Form CIDB L1/96 issued by CIDB to the plaintiff, letters from the first defendant as developer to the plaintiff as contractor of the project and also general insurance cover notes issued by Allianz General Insurance Co (M) Bhd to the first defendant (as principal) and the plaintiff as the main contractor. Minutes of site meetings found at pp 111–150 of Bundle B had all referred to the plaintiff as main contractor or building contractor, with no mention of YMN Tebrau Sdn Bhd. Based on the above, there had been sufficient materials in the form of documentary evidence to satisfy the burden of proof, such that the burden would then shift to the defendants (see paras 18–21). A
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- (2) There was no explanation as to why the first defendant had needed to issue a letter of award to the plaintiff, and why an active role had to be played by the first defendant, there was nothing advanced by the first defendant to explain the necessity for the letter of award which the first defendant issued to the plaintiff. Whatever the arguments mounted by the first defendant denying any privity of contract with the plaintiff so as to render the guarantee to be ineffective, the second and third defendants had not bothered to testify as to why they had signed the guarantee even though they had not been shown to be the directors of YMN Tebrau Sdn Bhd. In totality, the court accepted that the plaintiff's claim had been sufficiently made out and correct (see paras 26–27, 29–30 & 32). D
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[Bahasa Malaysia summary]

Ini merupakan plaintif terhadap defendan pertama untuk bayaran kontrak tertunggak dan defendan kedua dan ketiga di bawah satu jaminan berkaitan dengan kontrak tersebut. Plaintif pertama telah dilantik oleh defendan pertama sebagai kontraktor untuk melengkapkan bangunan rumah teres di satu projek perumahan kos separa rendah untuk Kerajaan Negeri Johor selaras dengan satu surat award bertarikh 3 Ogos 2011 pada jumlah kontrak RM51,150,000. Plaintif dikatakan telah menjalankan kerja-kerja tersebut dan telah dilengkapkan. Pembelaan mengatakan bahawa plaintif telah dilantik sebagai subkontraktor dan YMB Tebrau Sdn Bhd ('kontraktor utama') merupakan kontraktor utama projek tersebut. Pembelaan mengatakan bahawa kerja-kerja yang dilengkapkan oleh plaintif telah disahkan oleh arkitek yang mana perakuan tuntutan kemajuan telah dikeluarkan oleh kontraktor dan bukannya defendan pertama. Ianya dicabar bahawa defendan pertama bukanlah pihak yang bertanggungjawab untuk membuat pembayaran memandangkan ianya hanya pembangun yang dilantik oleh kontraktor utama dan oleh itu tiada hubungan kontrak antara defendan pertama dan plaintif. Jaminan tersebut dikatakan tidak mengikat memandangkan surat award G
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- A adalah antara kontraktor utama dan plaintif, tiada pengetahuan mengenai kontrak yang dibuat antara plaintif dan defendan pertama. Plaintif menegaskan bahawa kontrak tersebut, semua minit mesyuarat dan perakuan bayaran kemajuan adalah di antara plaintif dan defendan pertama. Jaminan yang ditafsirkan oleh plaintif sebagai memerlukan defendan kedua dan ketiga
- B untuk membayar apabila perakuan pelengkapan praktikal telah dikeluarkan untuk Fasa 1, 2 dan 3A secara individu dan bukan secara bersama sekiranya defendan pertama gagal untuk membayar.

C **Diputuskan**, membenarkan tuntutan dengan kos sebanyak RM10,000:

- (1) Selain daripada surat award, keterangan dokumentar yang lain yang berada dalam Ikatan B merupakan satu surat yang dikeluarkan oleh Construction Industry Development Board ('CIDB') yang telah memberikan plaintif pendaftaran Gred G7, kelulusan untuk
- D menjalankan projek tersebut. Wujud juga Borang CIDB L1/96 yang dikeluarkan oleh CIDB kepada plaintif, surat daripada defendan pertama sebagai pemaju kepada plaintif sebagai kontraktor projek dan juga *general insurance cover notes* yang dikeluarkan oleh Allianz General Insurance Co (M) Bhd kepada defendan pertama (sebagai prinsipal) dan
- E plaintif sebagai kontraktor utama. Minit mesyuarat tapak yang didapati di ms 111–150 Ikatan B semuanya merujuk kepada plaintif sebagai kontraktor utama atau kontraktor bangunan, tanpa apa-apa pengatahan mengenai YMN Tebrau Sdn Bhd. Berdasarkan perkara di atas wujud
- F bahan yang mencukupi dalam bentuk keterangan dokumentar untuk memenuhi beban pembuktian, oleh itu beban tersebut akan berpindah kepada defendan (lihat perenggan 18–21).
- (2) Tiada penerangan berkenaan mengapa defendan pertama perlu untuk mengeluarkan surat award kepada plaintif dan mengapa satu peranan utama telah dimainkan oleh defendan pertama, tiada apa yang
- G dikemukakan oleh defendan pertama untuk menerangkan keperluan surat award yang defendan pertama telah keluarkan kepada plaintif. Apa-apa hujahan yang dikemukakan oleh defendan pertama menafikan apa-apa pengetahuan mengenai kontrak yang dimasuki dengan plaintif
- H untuk menyebabkan jaminan tersebut tiada kesan, defendan kedua dan ketiga tidak memberikan keterangan berkenaan mengapa mereka telah menandatangani jaminan tersebut jikalau pun mereka tidak ditunjuk sebagai pengarah syarikat YMN Tebrau Sdn Bhd. Secara keseluruhannya, mahkamah menerima bahawa tuntutan plaintif telah dibuat secara
- I memadai dan adalah tepat (lihat perenggan 26–27, 29–30 & 32).]

Notes

For cases on claim for payment, see 3(3) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 4218–4221.

Cases referred to

Mega Mayang Me&E Sdn Bhd v Ehsan Bina Sdn Bhd & Ors [2017] MLJU 630 (refd)

Mandave Singh Gill a/l Harinder Singh (K Silla Dass & Partners) for the plaintiff. Ibrahim Haikal (Rafida Razak & Co) for the defendants.

Mohd Ivan JC:

[1] The plaintiff had sued the first defendant for outstanding contract payments, and the second and third defendants under a guarantee in relation thereto.

[2] The plaintiff claimed that it had been appointed by the first defendant as its contractor to build and complete 639 units of terraced two storey houses in a medium low cost housing project from the Johor State Government at Taman Setia Indah, Mukim Tebrau, Johor Bahru pursuant to a letter of award dated 3 August 2011 at a contract sum of RM41,150,000.

[3] This letter of award dated 3 August 2011 can be found at pp 8–9 of the common bundle of documents (marked as Bundle B) written under the letterhead of YMN Properties Sdn Bhd under Ref YMNP/AS/BUILD/TSI/0711/001, as the developer, to the plaintiff (as contractor) and signed by Hj Murad bin Bujang in his capacity as the executive director of the first defendant.

[4] The plaintiff claimed to have undertaken the works including variation orders as required, where architect's certificates had been issued certifying that the works had been duly completed.

[5] According to the statement of claim, a total of 39 architect's certificates had been issued from 31 October 2011–31 May 2017, where claims amounting to RM29,517,124.95 as at June 2017 had been made. The first defendant had then made a total of 67 payments up till 16 June 2017 in the total amount of RM23,101,395.82.

[6] In the defence, it was alluded that the plaintiff had been appointed the subcontractor for the project namely 'Cadangan Membina dan Menyiapkan Projek Penswastaaan Dengan Kerajaan Negeri Johor Darul Takzim yang mengandungi: 639 Unit Rumah Teres 2 Tingkat Kos Serdahana Rendah Jenis 1000KP Di Atas PTD 99419, 99421, 95453, 95456 dan 95458 di Taman Setia Indah, Mukim Tebrau, Johor Bahru, Johor Darul Takzim' by YMN Tebrau Sdn Bhd, who was the main contractor for the project, pursuant to a

A letter of award dated 3 August 2011, which had been accepted on the 8 August 2011.

B [7] At this juncture, to avoid and not add to any confusion, it must be stated that there are two letters, one by the first defendant and one by YMN Tebrau Sdn Bhd, both issued to the plaintiff with the same contents and both dated 3 August 2011.

C [8] The defence had alleged that the works completed by the plaintiff had been certified by the architects whereby the progress claim certificates had been issued by the contractor (who we will assume was YMN Tebrau Sdn Bhd) and not the first defendant. Reference was made to cl 16 of the agreement where interim claims were to be forwarded to YMN Tebrau Sdn Bhd for payment, which was subject to some percentage of retention.

D [9] It was thus contended that the first defendant was not the party responsible for making payment as it was merely the developer and was playing the role of superintending officer appointed by YMN Tebrau Sdn Bhd. Paragraph 9 of the defence had contended that the action ought to be struck out as there was no contractual relationship between the first defendant and the plaintiff.

F [10] In its defence, the first defendant added that the existence of a letter dated 6 August 2015 was in relation to a discussion on the 2 July 2015 where the plaintiff had issued a letter dated 9 July 2015 to complete Phase 1 and also to expedite Phases 2 and 3A after payment of RM500,000. It was therefore not an acknowledgement to pay by the first defendant but an undertaking from the plaintiff to continue work. This letter dated 6 August 2015 was found at pp 284–285 of Bundle B.

G [11] The guarantee was said not to be binding as the letter of award dated 3 August 2011 was between YMN Tebrau Sdn Bhd, as contractor, and the plaintiff. As there was no privity of contract between the plaintiff and the first defendant, the guarantee was also not binding, as the first defendant was not indebted to the plaintiff at the material time for the guarantee to take effect. The first defendant also claimed that the guarantee was not enforceable as the plaintiff had not completed Phases 1, 2 and 3A until the issuance of certificate of practical completion of the project as stipulated in the guarantee, which the plaintiff had failed to do. This guarantee, which was duly stamped, was an agreed document found at pp 280–283 of Bundle B.

I [12] In its reply, the plaintiff maintained it was the main contractor under the letter of award dated 3 August 2011 for the Contract No YMN/AS/Build/TSI/0711/001, and not the subcontractor as alleged in

the defence. The first defendant had instructed YMN Tebrau Sdn Bhd to issue the progress payment certificate, which had been on the first defendant's instruction/authorisation. The first defendant had, through YMN Tebrau Sdn Bhd, approved all payments to the plaintiff which was in relation to the same project awarded by the first defendant to the plaintiff.

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[13] The plaintiff had contended that the contract, all minutes of meetings and progress payment certificates had been between the plaintiff and the first defendant. The plaintiff had denied that it had agreed to complete Phases 1, 2 and 3A upon receipt of a payment of RM500,000 due to an earlier arrangement contained in a letter dated 6 August 2015 where the first defendant was to pay the plaintiff a sum of RM2,500,000 for progressive works done after the issuance of certificate of practical completion ('CPC') for Phase 1. The CPC was issued on 13 March 2017, but the first defendant had failed to make payment.

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[14] The guarantee was interpreted by the plaintiff as requiring the second and third defendants to pay as and when CPC had been issued for Phases 1, 2 and 3A, individually and not collectively, in the event the first defendant failed to pay.

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[15] In the course of the trial, it was not challenged that the first defendant and YMN Tebrau Sdn Bhd were related companies. Despite its contentions, the first defendant had not seen fit to join YMN Tebrau Sdn Bhd as a third party. The first defendant had taken the fight in this case on behalf of YMN Tebrau Sdn Bhd, where there was no position taken by YMN Tebrau Sdn Bhd vis a vis the plaintiff to speak of, whether the plaintiff had failed to complete the works.

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[16] The plaintiff had called its managing director, Chua Tiong Whee, Adam ('PW1') and its project manager, Sharil bin Hat ('PW2') to testify.

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[17] For the defence, DW1 was Goh Kuat Teik, a quantity surveyor from YMN Tebrau Sdn Bhd. DW2 was Nor Izam Faizal bin Ahmad Dahlan, the accounts and finance manager for the first defendant, and lastly, Nasir bin Hassan, the project manager, as DW3.

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[18] Apart from the letter of award, the other documentary evidence found in Bundle B was a letter issued by the Construction Industry Development Board ('CIDB') dated 8 September 2011 addressed to the plaintiff for the project at p 61 of Bundle B, which had given the plaintiff under Grade G7 registration, approval to undertake the project valid from 15 September 2011 to 14 March 2014. There was also a Form CIDB L1/96 issued by CIDB to the plaintiff.

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- A [19] Other documents found in Bundle B were letters dated 3 September 2011, 5 December 2011, 16 April 2012, 6 July 2012 and 26 July 2012, which were all from the first defendant as developer, to the plaintiff, as contractor, in relation to the project. There were also general insurance cover notes issued by Allianz General Insurance Co (M) Bhd to the first defendant (as principal) and the plaintiff as main contractor found at pp 101–110 of Bundle B.
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- C [20] Minutes of site meetings found at pp 111–150 of Bundle B were from 4 October 2011–13 October 2015, and had all referred to the plaintiff as main contractor or building contractor, with no mention of YMN Tebrau Sdn Bhd. The only other documents which had featured YMN Tebrau Sdn Bhd had been the progress payment certificates at pp 151–189 of Bundle B.
- D [21] As far as proof of the plaintiff's case was concerned, there had been sufficient materials in the form of documentary evidence to satisfy the burden of proof, such that the burden would then shift to the defendants.
- E [22] The first defendant had substantially relied on a document, which was the mirror image of the letter of award which the first defendant had issued to the plaintiff, but instead issued by YMN Tebrau Sdn Bhd to the plaintiff.
- F [23] This had been explained by the plaintiff that it was intended as a mechanism to facilitate the release of funds from the housing developer's account of YMN Tebrau Sdn Bhd to the plaintiff on behalf of the first defendant, who had been short of funds at the material time.
- G [24] The plaintiff had argued that based on the case of *Mega Mayang M&E Sdn Bhd v Ehsan Bina Sdn Bhd & Ors* [2017] MLJU 630, it mattered not the source of funds used for payment of contractual obligations, where 'Paying on behalf of a contracting party does not make the party paying a party to the contract between the contracting parties'.
- H [25] In any event, this arrangement for funds from the housing development account ('HDA') of YMN Tebrau Sdn Bhd to be accessed to pay the plaintiff's progress claims had not been denied by the first defendant or by YMN Tebrau Sdn Bhd.
- I [26] Although this would seemingly fit into the purpose for the same letter of award to be issued by YMN Tebrau Sdn Bhd to the plaintiff for its HDA funds to be used, there was no explanation as to why then the first defendant had needed to issue a letter of award to the plaintiff, and why an active role had to be played by the first defendant.

[27] Against this backdrop, there was nothing advanced by the first defendant to explain the necessity for the letter of award which the first defendant had issued to the plaintiff. There was no denial of such a letter being issued. If there was, in fact, a role played by YMN Tebrau Sdn Bhd in the project, there was surely no other manifestation apart from that letter of award and the progress payment certificates, both of which would have been satisfactorily explained by the plaintiff.

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[28] On the other hand, there was no evidence or explanation emanating from the first defendant as to the need to portray a contractual relationship with the plaintiff, or the need for such a relationship to be manifested in documents such as the guarantee. There was also no explanation of the other documents such as the CIDB documents, insurance coverage taken by the plaintiff and the role of the plaintiff stated in the minutes of meeting.

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[29] Whatever the arguments mounted by the first defendant denying any privity of contract with the plaintiff so as to render the guarantee to be ineffective, the second and third defendants have not bothered to testify as to why they had signed the guarantee.

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[30] As they have not been shown to be directors of YMN Tebrau Sdn Bhd, there would also have been no conceivable need for the guarantee to be signed by the second and third defendants in favour of the plaintiff in relation to the project. Instead, we have a situation where there was again no denial that the guarantee had been signed by the second and third defendants, who had both conspicuously not testified to convince the court of the version which they would have liked the court to believe.

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[31] On the amounts claimed by the plaintiff, the discrepancies have been attributed to GST no longer being applicable. Although the plaintiff had come up with a rationalisation of its claim, the first defendant appeared not prepared to even take a position as to what was owing. Perhaps this was part of the first defendant's strategy that it was not admitting the plaintiff's claims, such that no sum was payable by the first defendant to the plaintiff at all.

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[32] Under such circumstances and based on the weighing of the evidence and hearing the explanation of the witnesses, I am prepared to accept the plaintiff's claim to have been sufficiently made out and correct.

[33] I find that on a balance of probabilities, the plaintiff had successfully proven its case and that it is entitled to judgment for the amounts claimed.

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[34] I am therefore allowing the plaintiff's claim in terms of its statement of claim with costs of RM10,000 subject to allocator.

A *Claim allowed with costs of RM10,000.*

Reported by Izzat Fauzan

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